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Supreme Court, U.S.
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No. 93-287

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SUPREME COURT OF THE UNITED STATES
_____ TERM, 199___

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GEORGE G. WISE, RONALD GUBIS, DON WAKELAND, ALFRED FIKES, WILBERT H. HOLUB, J. G. FLEMING, DONALD A. RICHARDSON, ROY L. JORDAN, JAY F. NABOURS, FRANK STURDEVANT, MARVIN HEWETT, RICHARD W. PITTS, BUDDY G. NOTGRASS, VERNON O. WOOD, HARLIS W. LOGAN, RICHARD A. DAIGLE, J. KENNETH LUTHER, JERRY L. McNEESE, ROGER F. BOYD, W. R. CAVINESS, BOBBY L. HUGHES, ALBERT HYMAN, EVAN O. BIGELOW, and MARLON D. McCUTCHEN

Petitioners

v.

EL PASO NATURAL GAS COMPANY

Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

**PETITION FOR WRIT OF CERTIORARI**

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26 pp

## QUESTIONS PRESENTED

1. Whether this decision conflicts with Alexander v. Primerica Holdings, Inc., 967 F.2d 90 (3rd Cir. 1992) so clearly as to require this court to resolve the conflict.

2. Whether participants in a welfare benefit plan that provides health insurance to retirees can lose such benefits through plan amendment when all summary plan descriptions ("SPDs") in effect for the first eleven years after the passage of ERISA do not expressly or impliedly indicate that the benefits might be so lost.

In accordance with the provisions of Rule 14(b) of the Supreme Court Rules, the parties to this proceeding are all listed and identified in the caption of the case.

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|---|---|
| 14(b) | ii |
| 14(d) | 1 |
| 14(e) | 1 |
| 14(f) | 2 |
| 16.2 | 20 |

The following mandatory information is included in compliance with Rule 14 of the Supreme Court Rules.

**RULE 14(d).** This case is reported at 986 F.2d 929 (5th Cir. 1993).

**RULE 14(e).** Petitioners seek review of the panel decision of the United States Court of Appeals for the Fifth Circuit which was entered on March 25, 1993.

Petitioners timely filed a Motion for Re-Hearing which was denied by the Fifth Circuit on April 26, 1993.

This court has jurisdiction to review the Judgment by Writ of Certiorari under 28 U.S.C. §1254(1).

**RULE 14(f).** The statutory provisions most directly involved are 29 U.S.C. §1022(a)(1) and §1022(b) which are set out verbatim herein.

**"§1022. Plan description and summary plan description**

(a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and

obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 1024(b)(1) of this title.

* * *

(b) The plan description and summary plan description shall contain the following information: The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and

addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, of fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies

available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 1133 of this title)."

(Emphasis added).

## STATEMENT OF CASE

Beginning in 1959, El Paso Natural Gas Company ("EPNG") provided free health insurance to its retirees. EPNG proudly described this substantial benefit to attract and retain employees. Plaintiffs worked for many years anticipating this benefit and did not expect to pay health insurance premiums during retirement.

With the passage of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 et seq ("ERISA"), EPNG was obligated to distribute a written summary plan description ("SPD") which was "written in a manner calculated to be understood by the average plan participant," and was "sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and

obligation under the plan." 29 U.S.C. §1022(a)(1).

EPNG issued two SPDs in 1977 with regard to the retiree health insurance plan. Both contained the following promise:

> **YOUR RETIREMENT HEALTH CARE BENEFITS**
>
> Eligibility
>
> Upon retirement, you, your spouse, and eligible dependent children under 19 years of age are automatically insured for retirement health care benefits and the Company pays the entire cost.

EPNG amended the SPD in 1980 but the above quoted language was not changed. These SPDs are in the appendix.

This promise of retiree health insurance was not qualified or limited in

any way. Neither the 1977 nor the 1980 SPD contained any "reservation of rights" type language whereby EPNG reserved a right to alter, modify, or terminate benefits.

In fact, these SPDs clearly reflected that benefits would continue not only for the life of the retiree, but thereafter. Each SPD had a "TERMINATION OF BENEFITS AND CONVERSION PRIVILEGES" clause stating that family coverage would continue after a retiree's death until the remarriage of a surviving spouse or until a dependent child reached nineteen years of age.

EPNG was at all times under a clear statutory obligation to disclose <u>in the SPD</u> any circumstances under which these benefits might be lost. ERISA specifically requires SPDs to contain a

description of "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits;" 29 U.S.C. 1022(b).

In the summer of 1985, EPNG again amended its SPD and, for the first time since the passage of ERISA, inserted a clause which stated:

> " The Company reserves the right to alter, amend, delete, cancel or otherwise change the plan or any of the provisions of the plan at any time."

In October, 1985, approximately three months later, EPNG announced the total elimination of employer funded retiree health insurance. This drastic change - which converted retiree health insurance totally funded by the employer into retiree health insurance totally funded

by the retiree - occurred shortly before the end of each Plaintiff's employment. All Plaintiffs retired between 1986 and 1989, most with over thirty years of employment with EPNG.

The Fifth Circuit committed error (1) by attaching no significance to EPNG's eleven year violation of the disclosure requirements of 29 U.S.C. §1022(b); (2) by stubbornly refusing to interpret the SPD as it would be understood by an average plan participant; and (3) by ratifying EPNG's two-step amendment process which renders all SPD promises totally meaningless. This decision directly conflicts with Alexander v. Primerica Holdings, Inc., 967 F.2d 90 (3rd Cir. 1992).

## ARGUMENT

### I.

### THE FIFTH CIRCUIT DECISION CONFLICTS DIRECTLY WITH ALEXANDER V. PRIMERICA HOLDINGS, INC.

In Alexander v. Primerica Holdings, Inc., 967 F.2d 90 (3rd Cir. 1992), the employer maintained a similar plan for retiree health insurance. The Alexander plan required a $5.00 per month retiree contribution which the employer raised to $50.00 per month (a $45.00 per month increase).

To review the legality of that amendment, the court interpreted the following SPD language:

> " The Company expects to continue this Plan indefinitely, but necessarily reserves the right to amend, modify, or discontinue the Plan in the future in

conformity with applicable legislation."

Alexander, supra, at 92.

The Third Circuit concluded that this language was ambiguous because it might be read to mean that only amendments necessary to conform with new legislation were permitted. Id, at 92-94. Therefore, it reversed the District Court decision which granted Summary Judgment to the employer, stating:

"Because the summary plan descriptions do not clearly reserve the right to reduce benefits, we will reverse the district court's grant of summary judgment."

Alexander, supra, at 95.

The court recognized that, regardless of whether it reserved a limited or unlimited right, the SPD certainly addressed the right to reduce

benefits. Id, at 94. However, because SPDs must clearly warn employees of adversity, the Third Circuit determined that the language was ambiguous and might not have sufficiently done so.

Regardless of any possible ambiguity, the Alexander SPD warned plan beneficiaries that, under some circumstances, the plan might be discontinued. In contrast, the SPDs promulgated by EPNG for the first eleven years after the passage of ERISA contained no warnings, not even by implication, that benefits might be lost.

Obviously, the two decisions cannot be reconciled. If ERISA requires SPDs to express such warnings more clearly than was done in Alexander, then EPNG's eleven years of silence cannot be countenanced.

## II.

## THE FIFTH CIRCUIT SO FAR DEPARTS FROM THE LETTER AND SPIRIT OF ERISA'S SPD REQUIREMENTS AS TO NECESSITATE REVIEW AND CORRECTION

ERISA is a complicated and complex statute which regulates benefit plans that may involve insurance policies. Congress recognized that most participants and beneficiaries might not understand their rights and obligations if they had to review such documents.

Therefore, Congress required employers to issue SPDs "written in a manner calculated to be understood by the average plan participant,", and "sufficiently accurate and comprehensive" to reasonably apprise such participants of their rights. 29 U.S.C. §1022.

Further defining what is necessary to reasonably apprise participants of their rights, Congress required all SPDs to contain a statement describing "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits;" 29 U.S.C. §1022(b).

Because the SPD is the vehicle through which most participants learn of their rights, statements contained therein are binding. Any other rule would be "grossly unfair" and would undermine ERISA's requirement of an accurate and comprehensive summary. Hansen v. Continental Insurance Co., 940 F.2d 971 at 982 (5th Cir. 1991); Edwards v. State Farm Mutual Auto Insurance, 851 F.2d 134 at 136 (6th Cir. 1988); McKnight

v. Southern Life & Health Insurance, 758 F.2d 1566 at 1570 (11th Cir. 1985).

It is uncontested that EPNG, prior to 1985, did not distribute any SPDs which advised participants that retiree health insurance could be lost, or even compromised, through plan amendment. If the disclosure requirements have legal significance, Plaintiffs had an enforceable right to retiree health insurance because the SPDs did not disclose that the benefits might be lost.

However, the Fifth Circuit held that the Plaintiffs had no enforceable right to those benefits. The Fifth Circuit's primary error is its misinterpretation of the pre-1985 SPD language which stated, in relevant part:

**YOUR RETIREMENT**
**HEALTH CARE**
**BENEFITS**

Eligibility

> Upon retirement, you, your spouse, and eligible dependent children under 19 years of age are automatically insured for retirement health care benefits and the Company pays the entire cost.

The Fifth Circuit concluded that this language did not promise, or even imply, that an employee, upon retirement, would receive free health insurance. Accepting EPNG's questionable "tense" argument, the Fifth Circuit held that, because the above language was written in the present tense, it merely was stating the present applicability of the plan and was not conveying that these benefits would be available upon retirement.

This was an obvious error. If the average plan participant is given a

document which tells him what his **"RETIREMENT HEALTH CARE BENEFITS"** are, and further tells him that "Upon retirement" he receives free health insurance, he will reasonably conclude that he will receive such benefits upon retirement, regardless of the tense used to describe those benefits. The Fifth Circuit could not have more clearly ignored ERISA's requirement to interpret SPDs in a manner calculated to be understood by average plan participants.

The Fifth Circuit's next error is disregarding eleven years of violations of statutory disclosure requirements. In the summer of 1985, EPNG inserted language to reserve a right to alter, amend, delete or cancel benefits. No such language existed in any prior SPD

although EPNG was under a statutory duty to disclose circumstances which might result in a loss of benefits. The Fifth Circuit attaches no legal significance whatsoever to EPNG's violation of that disclosure requirement for eleven years.

Approximately three months after promulgating the 1985 SPD which "reserved" its right to alter, amend, delete or cancel benefits, EPNG announced the total elimination of employer funded retiree health insurance. Such an eleventh hour two-step amendment process renders SPDs meaningless.

Under the Fifth Circuit's holding, an employer can make unqualified promises for retiree benefits. Then, on the morning of the day a person is to retire, it could amend its SPD to "reserve" to itself a right to terminate

those benefits and do so in the afternoon. This holding renders SPDs meaningless and thwarts both the letter and the spirit of ERISA.

## SUMMARY

Petitioners pray that this court enter an order, in accordance with Rule 16.2, granting the Writ of Certiorari, requiring the clerk of the Court of Appeals for the Fifth Circuit to transmit the record, and scheduling briefing and oral argument.

Respectfully submitted,

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